IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.60 OF 2005

SMIFS Securities Ltd. ... Petitioners

v/s

United India Insurance Co.Ltd.

and others ... Respondents

Mr Chirag Balsara with Mr Vishal Maheshwari i/b M/s Negandhi Shah and Himayatullah for Petitioners.

Mr Rahul Narichania with Mr Sanjeev Singh for Respondent No.1.

Mr P.N. Modi with Mr Sagar Divekar i/b M/s Wadia Gandhy and Co. for Respondent No.2.

CORAM : D.K. DESHMUKH J.

DATE : 10TH OCTOBER 2005.

P.C. :-

1. By this petition, the petitioners challenge the award made by the Sole Arbitrator dated 28th October 2004 holding that the dispute referred to the arbitration is not arbitrable. The facts that are material and relevant for deciding this petition are that the petitioners are member of the Bombay Stock Exchange - respondent No.2. The respondent No.2 and its members including the petitioners are covered by an insurance policy issued by the respondent No.1 for financial loss caused by negligence, error or negligent omission on the part of an officer or employees of the insured. A client of the petitioners placed with it an order to execute 'tej badla' transaction for 8,75,567 shares of the Bank of India through the Stock Exchange BOLT terminal installed in Stock Exchange on 12th August 2000. It appears that one of the petitioners' dealers inadvertently punched in 87,55,567 shares instead of 8,75,567 shares. The punching error of adding one extra digit of '5' was made. The mistake was immediately realised and reversal of excess quantity of 78,80,000 shares was started and completed on the same i.e. 12th August 2000. In the reversal process, a loss of Rs.20,48,800/- was sustained. The petitioners informed about it to Bombay Stock Exchange as also their client.

The client however refused to accept the excess quantity of shares. The brokers declined the petitioners' request for cancellation of the transactions. The petitioners commenced arbitration proceedings against the brokers but the claims were dismissed by the Arbitrator. Thereafter, the petitioners filed claim against respondent No.1 for recovery of Rs.20,48,800/-. The respondent No.1 declined to make the payment. Therefore, the matter was referred to arbitration in terms of clause 4 of the General Conditions applicable. An objection was raised before the Arbitrator by the respondent No.1 that the dispute referred to arbitration is not arbitrable. That contention has been upheld by the Arbitral Tribunal and the claim made by the petitioners is dismissed. It is against this award, the present petition has been filed.

2. Perusal of the award shows that the learned Arbitrator has held that all the sub-clauses of clause 4 are to be read together. He has held that only in two cases, matter can be arbitrable viz. (1) where the Insurance Company proposes the settlement and the claimant does not agree to the proposed settlement and (2) where the Insurance Company admits the liability on behalf of the claimant but the claimant does not agree to the admission. In these two events, matter can be referred to the arbitration. The learned Arbitrator has

held that in order that the arbitration clause comes into operation, there has to be pending case where the Insurance Company gets an opportunity either to propose the settlement or suggest to the claimant the extent of claim that can be admitted.

3. The learned counsel appearing for petitioners and the learned counsel appearing for respondent No.2 submit that the learned Arbitrator has construed the arbitration clause narrowly. The learned counsel submit that the arbitration clause is to be liberally construed and if so done, even when the claim is not pending, the matter would arbitrable. It is further submitted that the provisions of clause 4 will have to be read in the light of the working of the Stock Exchange in relation to which insurance policy has been issued. It is submitted that whenever liability arises out of transactions on the Stock Exchange, the payment is made under the mechanism of the Stock Exchange and therefore, what is provided by insurance policy is the indemnity clause. Therefore, in so far as the transactions on Stock Exchange are concerned, the possibility of Insurance Company coming in before may be binding before the claim is settled is remote. It is submitted that in such a situation, if the construction placed on the arbitration clause by the learned Arbitrator is accepted, the arbitration clause will not come into play

in any transaction on the Stock Exchange. It is further submitted that the learned Arbitrator has held that for the arbitration clause to come into operation, there has to be a third party claim which the Insurance Company must decline to accept. In the submission of the learned counsel, the learned Arbitrator has held that the arbitration clause is not available in the present case only because there is no third party claim. It is submitted that in the present case, there is a third party claim because the claim was made on the petitioners by the brokers from whom excess quantity of shares were purchased and therefore, the learned Arbitrator has committed an error in holding that there is no third party claim involved in the present case.

4. On the other hand, on behalf of respondent No.1, it is submitted that what is decided by he learned Arbitrator is not whether the petitioners were entitled to make claim against the insurance Company, what has been decided by the learned Arbitrator is whether the claim made by the petitioners is arbitrable or not. The learned counsel submits that if clause 4 of the policy is read in its entirety, it is clear that the insurance policy provides for arbitration in a very limited situation. In all other situations, the remedy available to the parties is filing a suit. The learned counsel points out that clause 2 in terms provides for

filing of the civil suit where the Insurance Company has declined the payment. In the submission of the learned counsel, the interpretation put by the learned Arbitrator in any case is a possible construction and therefore, considering the jurisdiction of this Court to interfere with the award under section 34 of the said Act, the award cannot be disturbed.

5. Now, if in the light of these rival submissions the record of the case is perused, in my opinion, no exception can be taken to the observations made by the learned Arbitrator. Clause 4(d) of the contract, which is the arbitration clause cannot be read in isolation and that it will have to be read in the light of what precedes it viz. clauses 4(a), 4(b) and 4(c). Clauses 4(a) to 4(d) which are relevant read as under :-

> "4. Defence and Defence Costs and Expenses:-
>
> (a) The Company shall not be liable to pay any defence costs and expenses unless the express written consent of the company is obtained prior to such costs and expenses being incurred, which consent shall not unreasonably be withheld.

(b) The Company shall not be required hereunder to assume the handling or control of the defence or settlement of any third party claim made against the Insured but shall have a right (but not the duty) to take over at any time the control of the defence or settlement or compromise of any third party claim which is or might be the subject of Indemnity under this policy if the Company in its discretion deems it appropriate to do so.

(c) In so far as any third party claim or claims fall within the limit of Indemnity provided hereunder, then the Company shall have discretion to negotiate a settlement thereof including the admission of liability if the company deem it appropriate to do so and the Deductible stated in Item 7 of the Schedule hereto shall apply to any such settlement whether made with the Insured's consent or otherwise provided always that prior to any settlement or admission of liability being made the Company shall consult with the Insured who shall not unreasonably withhold their

consent to such settlement and/or admission of liability.

(d) In the event of the Insured and the Company being unable to agree as to the proposed settlement and/or admission of liability then (at the election of either party) the dispute shall be referred to an arbitrator to be appointed jointly by the Company and the Insured and his decision shall be binding on the Company and the Insured."

. The heading of clause 4 suggest that this clause deals with situation where the claim made against the insured is to be defended. Clause 4(a) lays down that the Insurance Company shall not be liable to pay the cost incurred by the Insured in contesting the claim unless prior written consent is obtained from the Insurance Company. Thus, the subject matter of clause 4 is the defence of the claim made against the Insured. Clause 4(b) gives an option to the Insurance Company to takeover the defence of the claim and also negotiate settlement of the claim. Clause 4(c) gives specific power to the Insurance Company to negotiate with the third party which has made the claim and to propose the settlement. It also empowers the Insurance Company to

propose admission of liability. Clause 4(c), apart from empowering the Insurance Company to negotiate the settlement or to propose admission of liability, also empowers the Insurance Company to enter into settlement or admit liability. In the absence of clause 4(c), it would have been impossible for the Insurance Company to interfere in the dispute between the third party and the Insured. It is only because of clause 4(c) that the Insured cannot object to the Insurance Company intervening in the pending dispute between the third party and the Insured. Clause 4(c) lays down that though the Insurance Company can enter into settlement or admit liability, it can do so only after consent of the Insured is obtained and then it provides that the Insured shall not withhold his consent to the settlement or admission unreasonably and it is in this background that clause 4(d) incorporates the arbitration clause. It in terms lays down that if there is dispute in relation to the proposed settlement or admission of liability, then the matter can be referred to arbitration. It is clear from the provisions of clause 4(d) that the disputes which can be referred to arbitration must relate to proposed settlement or admission of liability. It clearly means that the arbitration clause will come in when the Insurance Company proposes the settlement or proposes admission of liability of the third party, but the Insured withholds

his consent. Therefore, obviously the dispute that will have to be decided by the Arbitrator is whether the consent has been withheld by the Insured reasonably or unreasonably and also any other dispute between the parties relating to the settlement or admission. It is only to that limited extent that there is a provision made for arbitration. Perusal of the insurance policy shows that so far as all other disputes are concerned, the jurisdiction has been left with the Civil Court. Clause 2 in no circumstances lays down that if the dispute is not resolved, the Insured can file a suit in the Court of original civil jurisdiction. In my opinion, therefore, the construction placed by the learned Arbitrator is not only a possible construction but the only construction that can be put on the provisions of clause 4 without adding any words to the provisions. If the clause 4 is read in the scheme in which it appears in the policy, then in my opinion, the learned Arbitrator has correctly construed the arbitration clause.

6. So far as the submission made on behalf of the respondent No.2 that the learned Arbitrator has held that the dispute is not arbitrable only because of absence of third party claim is concerned, in my opinion, the submission is not well founded. The learned Arbitrator in the award as observed thus :-

> "As was argued on behalf of the first Respondent and as I read clause 4, it applies only when there is a third party claim against the insured and the first Respondent has declined to accept liability in respect thereof or has proposed a settlement thereof and the insured and the Respondent are unable to agree as to admission of liability or the terms of the proposed settlement. It is only then that the dispute may be referred to arbitration. "

. It is clear from the above quoted paragraph from the award that the learned Arbitrator has held that existence of third party claim is necessary for application of the arbitration clause, the learned Arbitrator has also held that existence of proposed settlement or admission of liability are also necessary and as in the present case, there was admittedly no proposed settlement or proposed admission, the arbitration clause is not attracted. In substance therefore, the minimum that I find is that the construction put in by the learned Arbitrator is a possible construction and therefore, it will not be possible for this Court to interfere with the award in its limited jurisdiction under section 34. The petition

therefore fails and is dismissed with no order as to costs.

. Parties to act on the copy of this order duly authenticated by the Associate / Personal Secretary as true copy.

. Certified copy expedited.